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SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-6509

FRANK MIDDLETON, Petitioner,

versus

THE STATE OF SOUTH CAROLINA, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CITATIONS

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OPINION BELOW

The opinion of the Supreme Court of the State of South Carolina is reported at ___S.C.___, 222 S.E. 2d 763 (1976) and is set out in Appendix of Petition.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

Whether the admission of testimony establishing the Petitioner's refusal to consent to a search of his person constitutes a violation of his Fifth Amendment privilege against self-incrimination?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States, Section 1, thereof:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The entire Transcript of the proceedings below are set out at the end of this Brief. All references are thereto.

The Petitioner, Frank Middleton, was indicted for rape and armed robbery at the September, 1974, term of General Sessions Court for Charleston County (Tr., Statement).

The matter came to trial on December 10, 1974, and the issue this Petitioner concerns was raised during the direct examination of Detective Conklin, one of the investigating officers (Tr., p. 160, line 3; p. 193, line 25; p. 226, line 18).

At one point during that examination, the Solicitor asked Conklin if the latter had requested combings from the pubic area of the Petitioner. Counsel for the Petitioner objected, the jury was excused, and a full hearing was held on the matter. (Tr. p. 196, lines 7-19) In the absence of the jury, the Solicitor elicited testimony from Conklin to the effect that he had requested the Petitioner to submit to combing of his pubic area and that, at first, the Petitioner had consented. Subsequently, immediately before the actual combing, the Petitioner changed his mind and refused. (Tr. p. 196, line 20-p. 198, line 24) Counsel for the Petitioner then cross-examined Conklin. (Tr. p. 199, line 1-p. 203, line 25) At the close of Conklin's testimony at this hearing, counsel for the Petitioner objected to the inclusion of this testimony on the basis of the Fifth and Sixth Amendments. (Tr. p. 204, line 10-p. 206, line 22; p. 208, line 11-p. 209, line 12) After a rather lengthy argument, the trial court overruled the objection and the jury returned. (Tr. p. 209, lines 13-17)

Shortly after the Solicitor's examination of Conklin resumed, counsel for the Appellant made mention of the Fourth Amendment to the trial court. He later moved for a mistrial based upon the argument that the trial court's ruling that this testimony was admissible resulted in a violation of Appellant's Fourth Amendment rights. That motion was denied. (Tr. p. 256, line 12-p. 258, line 17)

The Petitioner was convicted and sentenced to prison terms of 25 and 40 years respectively for armed robbery and rape, to run concurrently.

ARGUMENT

I.

In his appeal to the South Carolina Supreme Court Petitioner sought reversal on both Fourth and Fifth Amendment grounds. Indeed much greater emphasis was placed upon the Fourth Amendment than upon the Fifth in his Briefs and arguments before the lower court. Nevertheless, in his Petition before this Court, he abandons his Fourth Amendment arguments and relies exclusively on what he alleges to be a violation of the Fifth Amendment privilege against self-incrimination. As a result, and because Appellant's Fourth Amendment contentions were without merit as shown in Respondent's Brief before the South Carolina Supreme Court, said Brief being attached hereto, the Respondent will address itself solely to the Fifth Amendment issue.

It is Respondent's position that Petitioner's Fifth Amendment guarantee against self-incrimination was in no way violated by the admission of the objected-to testimony. In support of that position, Respondent will rely upon the so-called "California Doctrine" on this issue as set down by Chief Justice Traynor in his opinion in People v. Ellis, 55 Cal. Rptr. 385, 421 P. 2d 393. The Ellis case has been cited with approval on this issue in Newhouse v. Misterly, 415 F. 2d 514 (9th Cir. 1969); Campbell v. Superior Court, 106 Ariz. 542, 479 P. 2d 685, 691; State v. Suddeth, 55 Cal. Rptr. 393, 421 P. 2d 402; State v. Haze, 218 Kan. 60, 542 P. 2d 720; Coleman v. State, 211 So. 2d 924 (Ala. 1968); State v. Andrews, 212 N.W. 2d 868 (Minn. 1973); Commonwealth v. Robinson, 229 Pa. Super. 131, 324 A. 2d 449; City of Westerville v. Cunningham, 15 Ohio St. 2d 121, 239 N.E. 2d 41; and State v. McGrew, 25 Ohio App. 2d 175, 268 N.E. 2d 291. The decisions of many other courts have agreed with Ellis without specific citation thereto, U.S. v. Stembridge, 477 F. 2d 874 (5th Cir. 1973); State v. Cary, 49 N.J. 343, 230 A. 2d 384; U.S. v. Parkins, 424 F. 2d 152 (9th Cir. 1970); Higgins v. Wainwright, 424 F.2d 177 (5th Cir. 1970); City of Waukesha v. Godfrey, 41 Wis. 2d 401, 164 N.W. 2d 314; State v. Holt, 261 Iowa 1089, 156 N.W. 2d 884, and Ellis also is in harmony with the pre-Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L. Ed. 2d 908, majority, 87 A.L.R. 2d 370, 378.

Initially, it is necessary to examine the scope of the Fifth Amendment privilege. It is well-established that the privilege applies to evidence of "communications or testimony" of the accused, but not to "real or physical" evidence derived from him. Schmerber, supra. 348 U.S., at 764.

It is equally well established that the accused cannot be penalized for exercising his Fifth Amendment privilege when under police custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 468, 86 S.Ct. 1602, 1625, 16 L. Ed. 2d 694. To rule otherwise would be to limit the privilege by making its assertion costly. Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 1232, 14 L. Ed. 2d 106.

Respondent contends, however, that the foregoing rule has no application to the instant case because the Petitioner's refusal to permit the search of his pubic area was not "a communication or testimony" of the accused within the meaning of Schmerber. Rather, it was circumstantial evidence of consciousness of guilt. The admission of such evidence, like evidence of an escape from custody, fake alibi, flight, suppression of evidence, etc., does not violate the privilege. It should also be noted, as Chief Justice Traynor does at 421 P. 2d 397, that this evidence did not result from a situation contrived to produce conduct indicative of guilt, like, for example, a polygraph test. Schmerber, 384 U.S., at 764. Instead, the police were seeking to obtain positive probative evidence and the Petitioner's conduct was merely incident to their efforts. Police abuse is very unlikely in this type of situation.

The distinction between Petitioner's refusal and the "communication or testimony" referred to in Schmerber is clarified in the following statement by Chief Justice Traynor:

> Although conduct indicating consciousness of guilt is often described as an "admission by conduct," such nomenclature should not obscure the fact that guilty conduct is not a testimonial statement of guilt. It is therefore not protected by the Fifth Amendment. By acting like a guilty person, a man does not testify to his guilt but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind. Ellis, supra, 421 P. 2d, at 397-398.

Concerning that distinction, Wigmore stresses that in criminal cases guilty conduct on the part of an accused is evidence in which the "circumstantial nature of the inference strongly dominates the testimonial aspect..." 2 Wigmore, Evidence (3d ed. 1940) Section 267, at p. 94.

Traynor goes on to orate, at 421 P. 2d, 398, fn. 12, that:

> The inferential chain here is no different from that which makes any event that does not directly illuminate the circumstances of the crime charged a relevant fact. The trier of fact must reason from, for example, an escape from jail, to a consciousness of guilt that would motivate the escapee's conduct, and, from that premise, to the conclusion that such conduct is relevant to the ultimate issue of guilt or innocence. The key factor is that no testimony of an accused, or other equivalent intended to communicate knowledge, such as a writing, sign language, or a demonstration, forms the basis for the inferential chain. Ellis, 421 P. 2d, at 398.

Petitioner relies heavily on the following language from Schmerber as support for the proposition that his refusal constituted a "testimonial product" within the meaning of that decision (Petition, pp. 5-7):

> "This conclusion would not necessarily govern had the state tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any testimonial products of administering the test - products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer a confession to undergoing the 'search,' and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case....
>
> "[The] petitioner has raised a similar issue in this case, in connection with a police request that he submit to a 'breathalyzer' test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under Griffin v. State of California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106. We think general Fifth Amendment principles, rather than the particular holding of Griffin, would be applicable in these circumstances, see Miranda v. Arizona, 384 U.S. at p. 468, n. 37, 86 S. Ct. 1624. Since trial here was conducted after our decision in Malloy v. Hogan, supra, making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements...." Schmerber v. State of California, 384 U.S. at 765, n. 9.

Respondent respectfully contends that Petitioner's reliance on the foregoing language is misplaced. This language reflects the Court's concern that coercive pressures, even unintended, might encroach upon the privilege. It is simply a recognition that the fear induced by the prospect of the actual taking of the physical evidence, especially if the process of the taking was likely to be painful such as the blood test in Schmerber, might itself produce a coercive device for eliciting a "testimonial product" of an incriminating nature. Respondent recognizes that such a product would be privileged under the Fifth Amendment, however, such considerations do not apply to the instant case, because, as established hereinabove, the inferences flowing from Appellant's refusal do not constitute a "testimonial product."

From the foregoing, it is clear that the admission of evidence establishing Petitioner's refusal to permit a combing of his pubic area was in

no way violative of his Fifth Amendment guarantee against self-incrimination. It is also clear that the decisions of the South Carolina Supreme Court on this point are not in conflict with those of this Court. State v. Smith, 230 S.C. 164, 94 S.E. 2d 886; State v. Green, 227 S.C. 1, 86 S.E. 2d 598; State v. Miller, 257 S.C. 213, 185 S.E. 2d 359.

CONCLUSION

For the foregoing reason, Respondent submits that Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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